No. 96-530

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KOREAN AIR LINES CO., LTD.,

Petitioner,

—v.—

ERIC W. FORMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

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The Opposition to the Petition ("Opp.") demonstrates a fundamental misunderstanding of the proceedings in the district court, the court below and the interpretation of the Warsaw Convention[1] by the Court in *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996).

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. § 40105.

ARGUMENT

I. Article 17 of the Warsaw Convention Was the Sole Legal Basis for the Award of Nonpecuniary Pre-Death Pain and Suffering Damages in this Case

Respondent attempts to obfuscate the basis of the district court's ruling by improperly accusing Petitioner KOREAN AIR LINES CO., LTD. ("KAL") of misstating the questions presented for review and the record below.

Prior to trial, KAL filed three *separate* motions in the district court, as follows: (1) a motion for a determination that the types of recoverable damages are governed exclusively by the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761, which precludes all nonpecuniary damages *including pre-death pain and suffering damages*, (2) a motion for partial summary judgment dismissing the decedent's pre-death pain and suffering claim and (3) a motion to preclude the expert testimony offered in support of the pre-death pain and suffering claim. By Memorandum Opinion and Order, entered April 8, 1993, the district court denied these three *separate* motions of KAL. With respect to the applicable law motion, the district court stated:

> The Warsaw Convention allows for the recovery of all "damages sustained" and does not limit who may bring the suit as long as they can prove the loss. The Court of Appeals for the District of Columbia has held that "damages sustained" refers to actual harm experienced. To the extent that this is contrary to the provision of DOHSA, the Warsaw Convention shall prevail.

In re Korean Air Lines Disaster of Sept. 1, 1983, Nos. 83-3587 *et al.*, memo. op. at 2 (D.D.C. Apr. 8, 1993) ("*In re KAL-DDC I*") (citation omitted) (A 53a).

Contrary to Respondent's statement that "the District Court made no statement as to the basis for the remedy" (Opp. at 2), the statement quoted above clearly encompasses the basis for

the recovery of nonpecuniary pre-death pain and suffering damages. The district court reaffirmed this ruling in denying KAL's post-trial motion for judgment as a matter of law. *Forman v. Korean Air Lines*, No. 83-3578, memo. op. at 5-6 (D.D.C. June 6, 1995) ("*Forman I*") (A 15a-16a).

It is absolutely clear that the sole legal basis for the district court's award of nonpecuniary pre-death pain and suffering damages was Article 17 of the Warsaw Convention.

II. Under the Convention "Compensable Harm Is to be Determined by Domestic Law"[2]

Respondent argues that the court below was not required to apply *Zicherman* to the damage award for pre-death pain and suffering "[b]ecause *Zicherman* did not address survival action damages." Opp. at 5-7. This argument misunderstands the effect of the Court's decision in *Zicherman* and overlooks the sole legal basis for the district court's award of nonpecuniary pre-death pain and suffering damages—Article 17 of the Warsaw Convention. *See Zicherman*, 116 S. Ct. at 632-635.

The Court in *Zicherman* unequivocally rejected the argument that any and all types of damages are recoverable directly under Article 17 of the Warsaw Convention. 116 S. Ct. at 632-635. The Court found that the Convention provides "nothing more than a pass-through, authorizing [courts] to apply the law that would govern in the absence of the Warsaw Convention." *Id.* at 636. Thus, the Court concluded:

> Articles 17 and 24(2) of the Warsaw Convention permit compensation only for legally cognizable harm, but leave the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules.

116 S. Ct. at 637.

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[2] *Zicherman*, 116 S. Ct. at 635.

The Court's holding is not limited to wrongful death and loss of society damages, as argued by Respondent (Opp. at 4), but applies to the determination of *all* "damages" recoverable in an action governed by the Warsaw Convention. Following the Court's holding in *Zicherman*, the question that confronted the court below[3] was whether nonpecuniary pre-death pain and suffering damages are recoverable under "the law that would apply in the absence of the Warsaw Convention." 116 S. Ct. at 636. Even Respondent accepts that this was the analysis mandated by *Zicherman*, when he states that "this Court's direction that a pass-through occur would point directly to the survival action remedy under general maritime law for pre-death pain and suffering." Opp. at 7; *see also* Opp. at 5-6. Thus, Respondent concedes that pursuant to the "direction" of *Zicherman*, damages must be based on some domestic law. In light of this concession, Respondent's argument that the court below "was not obligated to use [*Zicherman*] as precedent" (Opp. at 7) is incomprehensible.

The substance and effect of the applicable domestic law is the precise issue that the court below declined to address, even though both parties, pursuant to the direction of the court below, fully briefed the issue in their respective reply briefs. Respondent ignores that by declining to address KAL's argument, the court below improperly failed to "pass-through" to domestic law, whether the domestic law is general maritime law, as argued by Respondent, or DOHSA, as argued by KAL. The decision of the court below in effect affirmed the award of nonpecuniary pre-death pain and suffering damages solely on the basis of the Warsaw Convention, which is

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[3] As well as the Court of Appeals in *Saavedra v. Korean Air Lines*, 93 F.3d 547, 551 (9th Cir. 1996), *petition for cert. filed*, No. 96-623 (Oct. 18, 1996), and *Bickel v. Korean Air Lines*, 83 F.3d 127, 132 (6th Cir.), *amended on reh'g*, 96 F.3d 151 (6th Cir. 1996), and the district court below in *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10, 12 (D.D.C. 1996) ("*In re KAL-DDC II*"), *interlocutory appeal granted*, No. 96-8013 (D.C. Cir. Aug. 15, 1996).

contrary to the express "direction" (Opp. at 7) of the Court in *Zicherman*, 116 S. Ct. at 635.

Respondent's final argument that *Saavedra v. Korean Air Lines*, 93 F.3d 547 (9th Cir. 1996), *petition for cert. filed*, No. 96-623 (Oct. 18, 1996), does not conflict with the decision of the court below (Opp. at 7-8), is belied by the facts: (1) both *Saavedra* and this case arose out of the KAL flight KE007 disaster; (2) both *Saavedra* and this case were pending on appeal when *Zicherman* was decided; (3) both the court in *Saavedra* and the court below granted KAL's request to address the recoverability of pre-death pain and suffering damages in light of *Zicherman*; (4) both the plaintiffs in *Saavedra* and in the court below asserted that KAL waived the argument; (5) *BUT*, while the court in *Saavedra* addressed the effect of *Zicherman* and vacated the awards of pre-death pain and suffering damages, the court below declined to address the argument and upheld the award.

In view of the express holding of *Zicherman*, which extinguished the sole legal basis for the award for pre-death pain and suffering damages in this case, the court below not only had the authority to address whether nonpecuniary pre-death pain and suffering are recoverable under the domestic law, but legally was required to do so. *See Rivers v. Roadway Express*, 114 S. Ct. 1510, 1519 (1994); *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 96 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540-545 (1991).

III. The Court Has the Authority to and Should Address Both of the Questions Presented for Review

Respondent argues that while the second question presented for review by KAL is important and worthy of review, the Court should decline to review the question in this case because the court below "refused to address the substantive issue" of whether nonpecuniary pre-death pain and suffering

damages are available following *Zicherman*. Opp. at 8.[4] Respondent is wrong.

The court below did in fact "pass upon" the issue of the legal recoverability of pre-death pain and suffering damages. *See Lebron v. Nat'l R.R. Passenger Corp.*, 115 S. Ct. 961, 965-66 (1995). In refusing to decide whether nonpecuniary pre-death pain and suffering damages are recoverable after *Zicherman*, the court below upheld the district court's award of such damages based solely on Article 17 of the Warsaw Convention. *See supra* at 2-5. Similarly, by considering the sufficiency of the evidence to support the award of pre-death pain and suffering damages, the court below necessarily passed upon the antecedent question of whether nonpecuniary pre-death pain and suffering damages are recoverable as a matter of law. *See Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 77 (1990). Thus, the "substantive issue" was passed upon by the court below.

In light of the intervening decision of the Court in *Zicherman*, the abandonment by the district court below of its prior decision allowing pre-death pain and suffering damages[5], and the fact that the plaintiff in *Saavedra* filed a petition for a writ of certiorari requesting the Court to review this *exact* question, the Court should address the antecedent legal argument at this time by granting the Petition herein. *See Lebron*, 115 S. Ct. at 965-66; *U.S. Nat'l Bank of Oregon v. Independent Ins. Agents of America*, 508 U.S. 439, 445-47 (1993); *United States v. Williams*, 504 U.S. 36, 40-46 (1992); *Arcadia*, 498 U.S. at 77. Review at this time is prudent because it will avoid the possibility of further conflicts among the lower courts in this litigation and will not prejudice Respondent in any respect. Indeed, remanding the case for further proceed-

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[4] Respondent argues that the Court should grant plaintiffs' petition in *Saavedra v. Korean Air Lines*, 93 F.3d 547 (9th Cir. 1996), *petition for cert. filed*, No. 96-623 (Oct. 18, 1996). *See* Opp. at 7-8.

[5] *In re KAL-DDC II*, 935 F. Supp. at 15.

ings will serve only to delay further the ultimate termination of this litigation.

CONCLUSION

The Petition for a Writ of Certiorari should be granted in all respects.

Dated: October 29, 1996

Respectfully submitted,

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